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In The

Supreme Court of the United States

October Term, 1990

MEXICAN AMERICAN BAR ASSOCIATION OF TEXAS (MABA), *et al.*,

Appellants,

v.

THE STATE OF TEXAS, *et al.*,

Appellees.

On Appeal From The United States District Court For The Western District Of Texas

MOTION TO DISMISS, TO AFFIRM, OR TO AFFIRM AND DISMISS OF APPELLEE STATE DISTRICT JUDGE JERRY DELLANA

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QUESTION PRESENTED

Does Section 5 of the Voting Rights Act require preclearance of elected judgeships created by a statute enacted prior to the effective date of the Act as to Texas, simply because first elections for those judgeships were scheduled **after** the effective date of the Act as to Texas?

PARTIES

The parties in the court below are correctly stated in the Jurisdictional Statement of Appellants Mexican American Bar Association, et al.

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In 1971 the Texas Legislature enacted a statute creating the 200th and 201st District Courts of Travis County, Texas. The statute became effective on August 30, 1971. The first judge of the 201st District Court was appointed, pursuant to the statute, in 1973. The first election was held in 1974, and was won by Jerry Dellana. He took office in 1975 and has been regularly re-elected to the present time.

The Voting Rights Act was not extended to encompass changes in voting procedures in Texas until August 6, 1975, retroactive to an effective date of November 1, 1972. The state statute which created the two Travis County judgeships in issue had been in effect for more than one year before the effective date and has remained unchanged since that time. It has never been submitted for preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c. For reasons set forth below, it is submitted that as to the two Travis County judgeships created in 1971, such preclearance was not required. Accordingly, no substantial federal question is presented and the case should be dismissed, affirmed, or both affirmed and dismissed.

OPINION BELOW

The three-judge district court below unanimously held that the two judicial positions created by the 1971 Texas statute did not require preclearance under the Voting Rights Act. [Appendix to Appellant's Jurisdictional Statement, p. 1-40.][1]

JURISDICTION

While the court has jurisdiction of appeals from three-judge district courts under 28 U.S.C. Section 1252

[1] In this Motion the reference "[App. ___]" refers to the appropriate page in the Appendix provided with Appellant's Jurisdictional Statement.

and 42 U.S.C. Section 1973c, the court should not exercise its jurisdiction in this case because, as to the state statute in question, no substantial federal question is presented.

STATUTE INVOLVED

Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c.

STATEMENT OF THE CASE

INTRODUCTION AND FACTUAL HISTORY

On June 1, 1971, the Texas Legislature enacted S.B. 515, a statute creating the 200th and 201st District Courts of Travis County, Texas.[2] S.B. 515 became effective on August 30, 1971 [App. 57-58]. In 1975 the Voting Rights Act was extended to cover Texas, and given retroactive effect to November 1, 1972 [App. 44]. Thus, the Texas statute which created the two Travis County judgeships had been in effect for more than one year before the determinative date. It has remained unchanged since that time. The 200th District Court was created September 1, 1971, and the 201st was created effective January 1, 1973 [App. 4]. Elections for the 200th District Court first occurred in 1972 and for the 201st District Court first occurred in 1974 [App. 91-92]. State District Judge Jerry Dellana was first elected in 1974, and by subsequent elections has held the office ever since [App. 92].

[2] For purposes of analysis herein, these judgeships are referred to hereinafter as the "Travis County Judgeships."

S.B. 515 was never submitted for preclearance under either of the routes set forth in Section 5 of the Voting Rights Act, nor until this suit had anyone ever suggested that preclearance was required.[3]

Although the three-judge court below was divided on other issues in the case, it was unanimous in holding that Section 5 of the Voting Rights Act did not apply to S.B. 515. Chief Judge Bunton, who dissented from the majority opinion on other issues, agreed with the majority that Section 5 did not apply to the Texas statute enacted prior to November 1, 1972 [App. 17].

The position of Appellee State District Judge Jerry Dellana, like that of the unanimous court below, is that because S.B. 515 had been in effect for more than four years before the Voting Rights Act was extended to cover the State of Texas and more than one year prior to the effective date of Section 5's applicability to the State of Texas, preclearance was (and is) not required under the clear language of the Voting Rights Act.

SUMMARY OF ARGUMENT: THE QUESTION IS NOT SUBSTANTIAL

As to S.B. 515 which created the Travis County judgeships, the question presented in this case is quite narrow:

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[3] While the Appellants point out that the States' attorneys could not explain an 8-month delay in submitting the 1989 state statute, (Appellant's Jurisdictional Statement, p. 3 at n. 1), they fail to offer any explanation here, as they did in the court below, for why Appellants waited nineteen years to claim that S.B. 515 triggered Section 5 preclearance.

whether Section 5 preclearance must be obtained for judicial positions created by a statute enacted **prior to** the effective date of the Act, but which provided for elections to those positions **after** the effective date of the Act.

The question raises an issue which applies only to a narrow band of statutes which were **enacted** prior to the effective date of the Voting Rights Act as to the various covered jurisdictions (whether under the 1965 Act, the 1975 extension, or any other or future extension), but which established elections which first occur *after* the effective date. The issue is distinguishable from the more commonplace multitude of enactments passed after the effective date of coverage under the Voting Rights Act, where preclearance of any change would clearly be required.

The answer to this question is settled law by at least two opinions of this Court. Those decisions indicate that the date of enactment is the critical date for Section 5 analysis. This rule is entirely consistent with the congressional intent in enacting and extending Section 5 of the Voting Rights Act. Accordingly, based upon the absence of a significant issue, and because the issue has already been decided by prior opinions of this Court, intervenor urges the Court to dismiss, affirm, or affirm and dismiss, this cause.

ARGUMENT AND AUTHORITIES

I. ELECTIVE JUDGESHIPS CREATED BY STATE STATUTE ENACTED PRIOR TO THE EFFECTIVE DATE OF THE VOTING RIGHTS ACT NEED NOT BE PRECLEARED PURSUANT TO SECTION 5, DESPITE THE FACT THAT THE FIRST ELECTIONS TO FILL THOSE JUDGESHIPS WERE SCHEDULED TO BE HELD AFTER THE ACT WAS EFFECTIVE AS TO TEXAS.

A. The language of Section 5 does not reach enactments prior to November 1, 1972.

Section 5 of the Voting Rights Act [App. 44 et. seq.] requires the State to obtain preclearance if it seeks to "enact or seek to administer any voting . . . procedure with respect to voting different from that in force or effect on November 1, 1972." [App. 44] This requires an inquiry into any "changes"[4] from prior election procedures, and leads to the further inquiry into the voting system to be used as the proper base for comparison. In this case, the comparison must be between the voting procedure "in force or effect" on the statutory date for comparison, i.e., November 1, 1972, and the voting procedure which the state has implemented pursuant to S.B. 515. In order to do a comparison, then, it is necessary to determine first what system was "in force or effect on November 1, 1972." [App. 44] Prior to November 1, 1972, the system in force in Texas was a statute mandating elections for the

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[4] The proper focus is on "changes," as demonstrated by the regulations promulgated by the Attorney General to govern the administration of Section 5. See 28 C.F.R. §§ 51.12, 51.13, and 51.14. The examination of a "change" requires a comparison of a "before" and an "after." The question here is, "what is the 'before'?"

two Travis County judgeships both before and after November 1, 1972.[5] Appellants' sole basis for urging this Court's review of the decision below is the fact that general elections to the Travis County judgeships had not yet been conducted as of November 1, 1972, pursuant to the state statute enacted prior to that date. This position is simply without merit, since Section 5 clearly establishes the system in place as of November 1, 1972, as the starting point for comparisons.

B. Prior decisions of this Court recognize that the proper focus is on the system in place on November 1, 1972.

This Court has previously considered, on two occasions, the precise question involved. In *Perkins v. Matthews*, 400 U.S. 379, 91 S.Ct., 431, 27 L. Ed.2d 476 (1971), this Court considered a challenge to the changes in the system utilized for election of city aldermen in the City of Canton, Mississippi. Before 1961, the City of Canton elected its aldermen by wards. In 1962, a Mississippi statute mandated that city aldermen be elected by at large elections. After that statute was passed, the Voting Rights Act was enacted, and provided that any change enacted after November 1, 1964, needed to be submitted for preclearance. For unstated reasons, Canton in 1965 ignored the state statute and continued to elect its aldermen by wards. By 1969, Canton had indicated its intention to

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[5] Primary elections for the 200th District Court were scheduled prior to November 1, 1972. The general election for the 200th District Court occurred after November 1, 1972. [App. 91-92].

conduct elections at large pursuant to the state statute. A Section 5 challenge interrupted those plans.

The facts in *Perkins v. Matthews* required this Court to determine what system constituted the proper basis for comparison: whether to look at the **actual** practices of the City as demonstrated in elections of 1961 and 1965, or to look at the practice that **should have been** followed had the City followed the state statute enacted in 1962. In choosing the first alternative, this Court stated that the proper inquiry was to determine what procedure "would have been followed if the election had been held on [November 1, 1964]," 400 U.S. 379, 394, 91 S.Ct. 431, 440. The Court concluded that the procedure used "in fact" as of November 1, 1974, could only be ward elections, based upon the City's actual practice both before and after that date (1961 and 1965 elections) in electing aldermen by wards. 400 U.S. 379, 394, 91 S. Ct. 431, 440.[6]

This analysis in effect created a "hypothetical election" on November 1, 1964, the effective date of the Act as to Canton, Mississippi, and the Court determined the

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[6] Appellants' reliance on *Perkins v. Matthews* is misplaced (Appellant's Jurisdictional Statement, p. 15) because while the date of enactment of the state statute was not regarded as the critical event in that case, it was only so because the actual practice which followed the enactment did not conform to the state statute. If the City of Canton had complied with the 1962 act by conducting at-large elections in 1965, there would have been no "change" in 1969, or in 1965, for that matter, since the statute prescribing at-large elections predated the effective date of the Voting Rights Act of 1965. Canton's *failure to follow* state law in 1965 was the determining factor.

kind of election which would actually have been conducted on that date, given the evidence before it.

Applying that principle to Texas' S.B. 515, it is clear that if such "hypothetical election" had been held on November 1, 1972, based upon the state statute enacted the previous year, it would have been exactly the same system for elections that was actually followed when the judgeships became elected positions under S.B. 515. Since the hypothetical election would have been conducted precisely as the subsequent elections were conducted, there cannot have been a "change" to trigger preclearance under Section 5.[7]

The second case dealing with this issue is that of *City of Lockhart v. United States*, 60 U.S. 125, 103 S. Ct. 998, 74 L. Ed.2d 863 (1983). In that case, the City of Lockhart had used a numbered-post system for some 50 years as a "general-law" city in Texas. After the effective date of the Voting Rights Act as to Texas, the City of Lockhart became a "home rule" city and continued the practice of using numbered-posts to elect city councilmen. The trial court concluded that a general-law city was not entitled under Texas law to use a numbered-post system. Since a home-rule city could use numbered-posts, the trial court found that the institution of a home rule system "legitimized" a previously illegal system, and refused to "reward" the system for past illegal acts. 460 U.S. 125, 132, 103 S. Ct. 998, 1003.

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[7] The court below followed this "hypothetical election" analysis. [App. 5-6]

This Court concluded that the question of whether or not the City of Lockhart should be "rewarded for past illegalities" was irrelevant. The proper comparison under Section 5 did not require an inquiry into municipal powers of a general-law city in Texas. Rather, the inquiry was into the system actually in effect on November 1, 1972, regardless of what the state law might have required. 460 U.S. 125, 132, 103 S. Ct. 998, 1003. The court cited *Perkins v. Matthews*, to reaffirm its view that the comparison must be made with the procedure that would have been followed if an election had been held on November 1, 1972.

The Court's logic in the *Lockhart* case is unassailable:

> "This conclusion was based on the plain reading of [Section 5's] language. It is, moreover, in accord with the Act's underlying policy. Section 5 was intended to halt actual *retrogression* in minority voting strength without regard for the legality under state law of the practices already in effect." (Emphasis added)

460 U.S. 125, 132, 103 S.Ct. 998, 1003. The concept of "retrogression" requires a fixed starting point for a basis of comparison. The system in effect on November 1, 1972, was that fixed starting point. Because that system never changed, there could not be, and there was no, *retrogression*. Similarly, there is no retrogression in the creation of the two new judgeships prior to November 1, 1972.

C. The "Date of Enactment" standard is consistent with Congressional intent.

The legislative history surrounding the extension of the Voting Rights Act in 1975 makes clear that Congress'

objective was prevention of retrogression in minority voting rights. Noting that the Voting Rights Act of 1965 was widely regarded as "the most effective civil rights litigation ever passed," the history shows that the effectiveness of the Act derived from its ability to avoid the "case-by-case litigation" approach required by the earlier voting legislation of 1957, 1960, and 1964. S.REP. NO. 295, 94th Cong. 1st Sess. 11, *reprinted in* 1975 U.S. CODE CONG. & AD. NEWS 774, 777-778. The House Judiciary Committee report on the 1965 Act noted that up to that time, progress had been "painfully slow." Id. Even when a voting rights victory had occurred, those seeking to resist reform would impose "new ways and means of discriminating." Id.

This Court, in upholding the constitutionality of Section 5 of the 1965 Voting Rights Act, was aware that the thrust of the Act was to prevent maneuvers designed to evade or avoid remedial court orders. The legislative history demonstrates that Congress reaffirmed the objective of preventing retrogression, and that this Court had correctly perceived the objective. The Senate Report quoted with approval this Court's analysis:

> Congress knew that some of the States covered by Section 4(b) of the Act had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees. Congress had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for discrimination contained in the Act itself. *South Carolina v. Katzenbach,* 383 U.S. 301, 335 (1966).

S.Rep. No. 295, 94th Cong. 1st Sess. *reprinted in* 1975 U.S. Code Cong. & Ad. News 774, 781.

The same legislative history referred to the effective date of the 1975 Voting Rights Act extension. In analyzing Section 204 of Public Law 94-73 (which revised Section 5) the summary states that "the electoral laws and procedures of newly covered jurisdictions [including Texas] are *frozen* as of November 1, 1972." Id. at p. 814, [emphasis added]. It goes on to state that any *"change"* relating to voting in these jurisdictions cannot be enforced unless there is certification by the United States Attorney General or the United States District Court for the District of Columbia that the change is not discriminatory in purpose or effect." Id. This focus on laws and procedures in place as of November 1, 1972, clearly indicates that Congress intended to reach those "changes" which occurred after November 1, 1972.[8] An election system which had already been enacted cannot constitute a *change,* when viewed in that light, since it existed at the time the Act became applicable.

The Congressional objective of Section 5 is to provide a *roadblock* to any scheme enacted to avoid or evade the impact of court orders reducing voting discrimination. Stated another way, the Congress sought to "shift the advantage of time and inertia" by freezing a system in place, thus placing the burden on those who would justify any changes to the existing system. See *South Carolina*

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[8] As the lower court noted [App. 6] the Attorney General has adopted this position, at least implicitly, in interposing objections based solely upon the *enactment* of a bill creating new judgeships. [See also App. 80].

v. Katzenbach, 383 U.S. 301, 328, 86 S.Ct. 803, 818, 15 L.Ed.2d 769 (1966). Viewed in this light, a Texas statute which simply increased the number of judges available to preside over cases in Travis County, Texas, which was enacted four years before the Voting Rights Act was ever extended to apply to Texas, cannot be viewed as a device to avoid or evade, or to suppress minority voting strength. More importantly, however, this legislative history demonstrates that the focus of Congress was on preventing changes which would avoid or minimize voting rights reform, from whatever source. By "freezing" the voting system in place as of November 1, 1972, the Congress drew the line for the starting point for comparison of any subsequent revisions to voting laws or voting practices.

CONCLUSION

As to the Travis County judgeships, this case does not have significant impact because it involves such a narrow spectrum of cases. The legal issues it raises have been previously resolved consistently with the lower court's opinion. It does not frustrate Congressional intent. This Court should dismiss the appeal, or affirm the judgment below, or dismiss and affirm.

Respectfully submitted,

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